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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 233

DONALD M. POSEGATE and IDA J. POSEGATE, husband and wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL G. REES, JR., AND
JACK G. MARKS
Counsel for Petitioners
222 North Court Avenue
Tucson, Arizona

Dated: July 14, 1961

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 27, 1961.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals (R. 32-36), printed in Appendix B hereto, *infra*, pp. iv-ix, is reported in 288 F.2d 11.

JURISDICTION

The judgment of the Court of Appeals was entered on March 27, 1961 (R. 37). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTION PRESENTED

Whether an employee of the United States who suffers serious but non-disabling injuries in the scope of his employment is precluded by §§ 751 and 757(b) of the Federal Employees' Compensation Act from bringing an action against the United States under the provisions of the Federal Tort Claims Act.

STATUTES INVOLVED

The statutory provisions involved are §§ 751 and 757 of the Federal Employees' Compensation Act, 5 U.S.C., §§ 751, 757, and the Federal Tort Claims Act, 28 U.S.C., §§ 1346(b) and 2674 et seq. They are printed in Appendix A, *infra*, pp. i-iv.

STATEMENT

Donald M. Posegate and Ida J. Posegate, his wife, brought an action against the United States under the provisions of Subsection b of the Federal Tort Claims Act, 28 U.S.C., § 1346(b), based upon the negligence of the United States which caused Mr. Posegate to be struck by a nine-ton gun or field piece, which crushed and pinned him to the ground beneath the gun. Among his multiple injuries, Mr. Posegate received ". . . a fractured pelvis, a ruptured bladder and urethra, the severance of certain nerves in the lower intestinal tract, and other serious and

permanent bodily injuries, which injuries have rendered him permanently impotent." (R. 32). (In a second count damages for loss of comfort and consortium were claimed, which claim has now been abandoned. Mrs. Posegate remains as a petitioner because of her community property interest.)

From requests for admissions and the reply filed by petitioners, it appears that on the date of the accident, February 26, 1958, Posegate was an employee of the United States and that the incident occurred at his place of work and within the scope of his duties. He applied for compensation under the provisions of the Federal Employees' Compensation Act, 5 U.S.C., § 751 et. seq., and an award was made for some of the injuries received, but not for the permanent impotence, as to which he was informed by the Compensation Board, ". . . there is no provision in the law to cover the condition. . ." with which he is now permanently afflicted. (R. 33).

The District Court granted a motion to dismiss the action for failure to state a claim, upon its interpretation of §§ 751 and 757(b) of the Federal Employees' Compensation Act, which provides in pertinent part:

> §751. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a *personal injury sustained while in the performance of his duty*, . . .
>
> §757. (b) The liability of the United States . . . with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in ad-

miralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute . . ."

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court upon the authority of certain state decisions (representing one side of a divergence of the state authorities) and one opinion of the Court of Appeals for the District of Columbia, *Smither and Company, Inc., v. Coles,* C.A.D.C., 1957, 100 App. D.C. 68, 242 F.2d 220, cert. den. 354 U.S. 914. This latter case is discussed and distinguished below. Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C., § 1291.

REASONS FOR GRANTING THE WRIT

1. It would appear that the intent of Congress as set forth in the applicable statutes is being misconstrued by the District Court and Court of Appeals below which limited the scope of these remedial statutes wrongfully and unnecessarily. The problem of the workman who is scarred or disfigured, rendered sexually impotent, or otherwise maimed but still able to work, has faced many of the state courts in this country, but with mixed results.

2. Workmen's compensation law is primarily a matter of statutory construction. Thus, most state courts in this country have held that an action for damages should be allowed for *occupational diseases,* when they are not listed and compensated, for the reason that the legislature didn't intend to deprive employees of all remedy by withholding compensation in these cases. In *disfigurement* cases there has been little need to resort to tort remedies, since these are now generally held to be compensated. Compensation has been frequently denied when *injury to reproductive organs* without loss of earning capacity is claimed, although not without dissent. *Pain and suffering* as a separate element of an otherwise compensable injury is gen-

erally regarded as not the subject of a separate action for damages. See note, 34 Minnesota Law Review 172-176. The cases in the state courts on both sides of this split of authority are briefed in annotations found in 100 A.L.R. 519, supplemented, 121 A.L.R. 1143.

In *Jones v. Rinehart & Dennis Co.*, 1933, 113 W. Va. 414, 168 S.E. 482, at 486-7, the court states:

> "In many of the states the workmen's compensation statutes exempt employers from liability for damages only in cases in which the employees are entitled to compensation under the acts. In the very able brief of counsel for the defendants in the instant case, it is stated that in forty of the forty-four states having workmen's compensation acts the exemption of employers is thus limited. It is further stated in the said brief that the only states not thus limiting the exemption of employers are North Dakota, Ohio, Washington and West Virginia. It thus appearing that in most of the states, under express provisions of their compensation acts, employers are not exempt from liability for damages in non-compensable cases, employers within this jurisdiction would merely be placed on the same basis as most of the employers elsewhere if we construe our statute as having like meaning and effect. It would therefore seem that such construction would involve no special nor exceptional hardship."

See also, *Cason v. American Brake Shoe & Foundry Co.*, D.C.D. Colo., 1940, 32 F. Supp. 680 at 683.

The District Court and Court of Appeals in this case have both chosen to follow the narrow, outmoded state view which denies to such non-disabled employees any remedy for their injuries. See the excellent dissent of Justice Wade in *Masich v. U.S. Smelting, Refining & Mining Co.*, 1948, 113 Utah 101, 191 P.2d 612, at 626. A pronouncement by this Court would give finality to this disputed issue, and would serve as a guidepost to all the federal courts which will be repeatedly faced with this same problem in the coming years.

2. It cannot be said that this matter is presently in dispute in the Courts of Appeals, since it appears this specific point has not been raised, except obliquely, in the case of *Smither and Company, Inc. v. Coles, supra.* However, a decision in this matter upon the present petition would have widespread effect in deciding "• • • an important question of federal law which has not been, but should be, settled by this court." (Rule 19, Rules of the Supreme Court.) Furthermore, such a decision would correct the error of the lower courts in relying upon *Smither, supra.* That case was a suit by a wife for loss of consortium due to injuries suffered by her husband in using a defective ladder. It was admitted in the case that he had received compensation for his injuries, so that the effect was an attempt by the wife to collect a second time for the same injuries. In the instant case the situation is entirely different. Mr. Posegate was compensated for the time while he was hospitalized for his fractured pelvis, but as soon as this injury healed and he was able to return to work all compensation ceased. Post-traumatically he suffered a complete and permanent impotencia, which does not disable him from his normal work activity. This permanent disability is therefore non-compensable, because compensation is based solely on loss of wage-earning capacity. (R. 21). He has not been, nor will he ever be, compensated for this serious disability under the Federal Employees' Compensation Act. Thus, where *Smither* may be applicable to attempts to *duplicate* recovery from the United States, it does not answer the problem in the instant case. Actually there have been no federal court decisions which petitioners have been able to find upon the specific point.

3. At present, far from being a salutory remedial measure, to the petitioners and others in Mr. Posegate's situation, the Federal Employees' Compensation Act amounts

to a barrier, barring him from the right of recovery for negligently-inflicted personal injuries which is extended to all others protected by the Federal Tort Claims Act (i. e. — all non-federal employees, employees off duty when injured, etc.). The determination by this Court of the narrow problem in this case must necessarily have consequences which reach far beyond the immediate persons before the Court. Because the issue in this case is directly exposed, it can be readily decided by this Court.

4. This Court, by a divided opinion, in the case of *Johansen v. United States*, 1952, 343 U.S. 427, held that injured employees who received federal compensation were precluded from a suit against the United States under the Public Vessels Act, 46 U.S.C., § 781, et seq. Necessarily this opinion must have presupposed that such injured employees were in fact going to receive compensation under the applicable compensation statute, commensurate with the nature and extent of the particular injuries involved. *Johansen* seems to be a landmark in the field; but the line of authority following its reasoning does not answer the problem raised in the instant case. See *United States v. Brown*, 1954, 348 U.S. 110. The opinion of the Court of Appeals below, it is submitted, incorrectly interprets the statute so as to deny to employees *any* form of adequate remedy for any injury which doesn't actually prevent him from being employable. The agency charged with administration of the Federal Employees' Compensation Act has interpreted said Act as denying all benefits to employees suffering serious but non-disabling injuries. (R. 20-21). By so doing, it is believed that a considerable number of persons may well be receiving no compensation for injuries suffered in the course of their employment by the United States, due to a misapprehension of the true meaning of the applicable statutes. It is respectfully submitted that this misapprehension is due, at least in part, to the broad

language of the post-*Johansen* opinions, which have influenced the lower courts in this case, and which bears no factual resemblance to the *Johansen* line of authority, in that this is a case of no-compensation rather than double-compensation.

5. In essence, the courts below interpreted § 757 (b) of the Federal Employees' Compensation Act as prohibiting petitioners' suit against the government for negligence. There are three possible interpretations of Congressional intent as expressed in the 1949 Amendment to the Federal Employees' Compensation Act, 5 U.S.C. § 757 (b):

(1) Congress intended that to all federal employees the *possibility* of being eligible for compensation benefits was sufficient justification for making the remedy exclusive. If we consider that this alternative is the true Congressional intent, then we must conclude Congress expressly intended there be certain injuries for which there would be no remedy whatever. We would have to conclude that Congress intended that the worker rendered sexually impotent by governmental negligence would have to "grin and bear it." This is the effect of the decisions in the courts below.

(2) Congress intended that to all federal employees only the *fact* of actually being eligible to receive compensation benefits would prevent their suing for negligence of the government. If the employee is not eligible for benefits, then Congress meant him to retain his right of action for tort. The courts below have found it difficult to reconcile this view with the language of the committee reports, as pointed out in the opinion of the Court of Appeals (Appendix B). However, it is submitted this interpretation actually fits the overall Congressional intent of liberalizing the benefits to employees of the United States. The

problem is whether a basis for such an intent can be proved; it is the petitioners' position that this Court need not go so far as to declare this to be the express intent of Congress in order to grant the petition for the writ of certiorari.

(3) Congress intended that to all federal employees who received compensation benefits under the Federal Employees' Compensation Act there would be denied any additional remedy under any other federal act, but never adverted to the specific problem of the workman with non-compensable injuries. This third interpretation is most likely the correct one, since it rationalizes *all* the language of the statute and committee reports. If this third interpretation is correct, then there is a "loop-hole" in the present compensation law — an area wherein an employee with non-disabling injuries receives absolutely nothing from his government, despite the brave language of the Congressional committees about liberalizing benefits through passage of the 1949 amendments.

Now, if this Court agrees that there is an area of ambiguity as to Congressional intent, then the legal problem resolves itself into determining how best to interpret the ambiguity, consistent with the overall purpose of the compensation statutes. This issue is narrow; the transcript is short; but the result is of importance to all employees of the United States and to the Congress, as an interpretation is necessary whether the statute is exclusive for all injuries or exclusive for only the injuries which are disabling and thus compensable. It is respectfully submitted that in resolving such ambiguity the remedial nature of the statute and the often-articulated policy of favoring liberal construction of compensation statutes to benefit the individual workman should be the proper guide.

The following propositions support petitioners' view, that Mr. Posegate has not been precluded from this tort claim by the 1949 amendment to the Compensation Act:

(a) This Court has stated that the compensation system, like the Federal Tort Claims Act, "• • • be construed to fit, so far as will comport to its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres v. United States*, 1950, 340 U.S. 135. Congress evidently meant to inter-relate the compensation act and the tort act, so that where one left off the other would take up. The interpretation advanced by petitioners would best create this system of uniform justice for all.

(b) No "flood" of litigation would occur, since this narrow point ecompasses only those cases where there existed the combined elements of negligence, non-disability (impotencia), refusal of compensation by the Bureau of Employees' Compensation and lack of any other remedy.

(c) Congress intended to protect as many federal employees as possible by the Federal Employees' Compensation Act, and to make the compensation remedy exclusive only as to any *person protected by the Act*. The corollary is that unprotected persons should not be prohibited their tort suits.

(d) Posegate was "protected by the Act" only as to *some* of his multiple injuries; though these have healed, the loss of his sexual powers due to negligence is a great and tragic blow to him. For this wrong, he should have a remedy.

(e) Congress has not *expressly* denied the right of action for non-disabling injuries. Whether it has the power to do so is not here raised in issue. The sole issue is whether the Court of Appeals was bound to find that Congress *impliedly* denied such right of action in tort to petitioners.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,
PAUL G. REES, JR., and
JACK G. MARKS,
222 North Court
Tucson, Arizona
Counsel for Petitioners

July 14, 1961

APPENDIX A

1.

5 U.S.C., § 751, reads as follows:

§ 751. *Disability or death of employee; wilfull misconduct.* The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another or if intoxication of the injured employee is the proximate cause of the injury or death.

2.

5 U.S.C., § 757, reads as follows:

§ 757. *Persons receiving compensation not to be paid for other services; pensions; election; right to compensation as exclusive; exception.*

(a) As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States: *Provided*, That whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased)

as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Secretary may for good cause allow, and when made shall be irrevocable unless otherwise provided by law.

(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however*, That this subsection shall not apply to a master or a member of the crew of any vessel.

3.

28 U.S.C., § 1346, reads as follows:

§ 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claim to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or in

regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

4.

28 U.S.C., § 2674, reads as follows:

§ 2674. *Liability of the United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

APPENDIX B
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD M. POSEGATE, and IDA J. POSEGATE, Husband and Wife,
Appellants,
vs.
UNITED STATES OF AMERICA
Appellee.

No. 16,973
March 27, 1961

On Appeal from the United States District Court for the District of Arizona

Before: POPE, HAMLEY and HAMLIN, Circuit Judges.

HAMLIN, Circuit Judge:

Donald M. Posegate and Ida J. Posegate, his wife, brought on action in the United States District Court for the District of Arizona against the United States under the provisions of the Federal Tort Claims Act.[1] The complaint alleged that on February 26, 1958, as a result of the negligence of the United States Donald M. Posegate was struck by a nine-ton gun or field piece, crushed and pinned to the ground beneath said gun. He received "a

[1]28 U.S.C.A. § 1346(b).

fractured pelvis, a ruptured bladder and urethra, the severance of certain nerves in the lower intestinal tract and other serious and permanent bodily injuries, which injuries have rendered him permanently impotent."

Donald Posegate in Count One of the complaint sought damages in the sum of $125,000 for his alleged impotence, and his wife Ida sought damages in Count Two in the sum of $25,000 for loss of "the comfort, society and consortium of her husband." Subsequent to the filing of the complaint the United States made a request for admissions, and from the reply made by appellants it appears that on February 26, 1958, at the time of the injury, Donald Posegate was an employee of the United States; that the injury occurred upon a government reservation in Arizona during the regular working hours of said Donald M. Posegate; that on March 3, 1958, he applied for compensatiton under the provisions of the Federal Employees' Compensation Act; that on April 7, 1958, he was advised that an award under the provisions of the Act had been made to him on account of the injury; and that thereafter he collected the amount of the checks mailed to him pursuant to the award. In his reply to the request for admissions, Posegate denied that he had applied for compensation intending to waive any rights under any other federal laws, and denied any knowledge that any acts performed by the appellants constituted an election of remedy. He admitted that an award had been made under the provisions of the Federal Employees' Compensation Act on account of some of the injuries received in the accident of February 26, 1958, but denied that an award had been made to him on account of the injury set forth in the complaint (permanent impotence) and alleged in this respect that he had been informed "there is no provision in the law to cover the condition" with which he is now permanently afflicted.

After this reply to the request for admissions had been made by appellants, the United States moved to dismiss the complaint for failure to state a cause of action within the jurisdiction of the district court. The district court granted the motion and dismissed the action. This appeal followed. This court has jurisdiction of the appeal by reason of 28 U.S.C.A. § 1291.

The United States contends that the action of the district court in dismissing appellants' complaint was proper because any liability of the United States to either of the appellants was exclusively under the provisions of the Federal Employees' Compensation Act, 5 U.S.C.A. § 751 *et seq.* Sections 751(a) and 757(b) thereof provide in part as follows:

> § 751. (a) The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, . . .
> • • • • •
> § 757. (b) The *liability* of the United States . . . *with respect to the injury or death* of an employee *shall be exclusive, and in place, of all other liability of the United States . . . to the employee*, his legal representative, *spouse*, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action . . . or *under any Federal tort liability statute*: . . . [Emphasis added]

Appellants' contention is that though Donald has received hospitalization, surgery and medical treatment from the date of the injury and though an award has been made to him, this award is only for some of the injuries which he has received. He claims that his present condition of permanent impotence is a non-disabling injury, that he has received no compensation for this injury, and that he has been advised by the Bureau of Employees'

Compensation of the United States Department of Labor that "[c]ompensation under the Federal Employees' Compensation Act is based on loss of wage earning capacity. There is no provision in the law to cover the condition you mentioned." He therefore contends that he has the right to sue the United States under the Federal Tort Claims Act for the negligence of its agents which proximately caused the serious, but non-disabling injuries complained of. We do not agree.

Similar claims have arisen under state workmen's compensation and similar statutes, and recovery in these cases has been denied. *Hyett v. Northwestern Hospital*, 147 Minn. 413, 180 N.W. 552 (1920) (sexual powers reduced); *Farnum v. Garner Print Works*, 229 N.Y. 554, 129 N.E. 912 (1920) (unable to beget children); *Frese v. John Morrell & Co.*, 58 S.D. 634, 237 N.W. 886 (1931) (loss of testicle – pain and suffering).

In *Smither & Co., Inc. v. Coles*, 242 F.2d 220 (1957), which was an action by a wife for loss of consortium after her husband had received the maximum benefits under the District of Columbia Workmen's Compensation Act, the court said:

> "The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation.

As stated by Mr. Justice Brandeis in Bradford Electric Co. v. Clapper, 1932, 286 U.S. 145, 159, 52 S.Ct. 571, 576, 76 L.Ed. 1026, the purpose of these laws was to provide 'not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinative.' " [Footnote omitted][2]

The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act as quoted above is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery "shall be exclusive, and in place, of all other liability of the United States." His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time that the statute was amended in 1949. The House Committee Report[3] contains the following:

"It is the committee's purpose to have the language of such Section 7 entirely clear in this respect so as to express the intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer."

Similarly, the Senate Report[4] states:

"The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action

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[2]242 F.2d at 222.

[3]H.R.Rep. No. 729, 81st Cong., 1st Sess. 14, 15 (1949).

[4]S.Rep. No. 8[illegible] 1st Cong., 1st Sess. 23, 30 (1949).

or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute."

It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a recovery by appellant. Donald Posegate was a "person protected by the act." He received medical treatment and substantial payments under the Federal Employees' Compensation Act as a result of the accident in question. We hold that he cannot recover under the Federal Tort Claims Act for his claimed nondisabling injury.

Neither is there any merit to the claim of his wife under Count Two of the complaint for damages for the loss of consortium. *Smither & Co., Inc. v. Coles, supra; Jeune v. Del E. Webb Const. Co.*, 77 Ariz. 226, 269 P.2d 723 (1954).

The judgment of the district court is affirmed.

(Endorsed) Opinion Filed March 27, 1961.

Frank H. Schmid, Clerk.

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Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, Section 5 8

MISCELLANEOUS:

H. Rept. No. 729, 81st Cong., 1st Sess., pp. 14-14 ..... 6, 7

S. Rept. No. 836, 81st Cong., 1st Sess., pp. 23, 30 5

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 233

DONALD M. POSEGATE AND IDA J. POSEGATE, HUSBAND AND WIFE, *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. B) is reported at 288 F. 2d 11.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1961. On June 22, 1961, the time to file a petition for certiorari was extended by Mr. Justice Douglas to and including July 17, 1961. The petition for certiorari was filed on that date.

QUESTION PRESENTED

Whether the Federal Employees' Compensation Act provides the exclusive remedy against the United States for a federal employee who has been injured in the course of his employment.

STATUTE INVOLVED

The pertinent portions of Sections 1 and 7 of the Federal Employees' Compensation Act of September 7, 1916, as amended, 5 U.S.C. 751, *et seq.*, provides in pertinent part:

> Section 1:
>
> (a) The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty * * *
>
> Section 7:
>
> * * * * * * * * *
>
> (b) The liability of the United States * * * with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

Petitioner Donald M. Posegate was employed at an Army electronic testing center in Arizona. On February 26, 1958, while helping to move an Army field

piece in the course of his employment, he was trapped by the right front wheel, thrown to the ground, and run over. He suffered a fractured pelvis, ruptured bladder and urethra, and other injuries which allegedly rendered him impotent. Thereafter, he applied for and received compensation under the Federal Employees' Compensation Act.

On May 7, 1959, he instituted this action under the Federal Tort Claims Act to recover damages for his alleged impotency.[1] The complaint charged that the accident had been occasioned by the negligence of employees of the government. In petitioner's view, his receipt of compensation under the Compensation Act did not bar the tort claim because, according to information which he had received, the coverage of that Act does not extend to impotency.

The district court granted the government's motion to dismiss the complaint for failure to state a cause of action. The court of appeals affirmed, holding that by reason of Section 7 of the Compensation Act, *supra*, p. 2, the petitioner's exclusive remedy for the injuries sustained lay under that Act.

ARGUMENT

Petitioner Donald Posegate is a federal employee who was injured in the course of his employment and has admittedly applied for and received compensation benefits under the Federal Employees' Compensation Act. Both courts below have held that the remedy provided by that Act is exclusive and precludes a

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[1] In a separate count in the complaint, petitioner's wife sought damages for loss of comfort and consortium. That claim was subsequently abandoned and is not before this Court (Pet. 3). Mrs. Posegate states that she is a petitioner in this Court because of her community property interest (Pet. 3).

suit under the Tort Claims Act. We submit that this conclusion is clearly correct. The explicit terms of the Compensation Act, its legislative history, and the prior judicial interpretation all require the rejection of petitioners' theory that a federal employee may invoke the Tort Act to recover for those consequences of his injury which are not compensable under the Compensation Act.

1. Section 1 of the Compensation Act, 5 U.S.C. 751, makes the United States liable "for the disability or death of an employee, resulting from personal injury sustained while in the performance of his duty." Although the Act provides a comprehensive schedule of payments for various injuries, it makes no provision for payment for pain, suffering, non-disabling disfigurement, and loss of sexual power such as that suffered by petitioner (5 U.S.C. 753-756). Nonetheless, Section 7(b) of the Act, *supra*, p. 2, expressly states that "the liability of the United States" for such disability and death payments under the Compensation Act "with respect to the injury or death of an employee," while in the performance of duty, "shall be exclusive, and in place of all other liability of the United States to the employee * * * on account of such injury or death" in judicial proceedings "under any Federal tort liability statute." In other words, under the plain terms of the Compensation Act, the liability of the government to a federal employee injured in the course of his employment is limited to that provided by the Compensation Act.

2. Petitioner, however, would have Section 7(b) read as if it said that the liability of the United States "shall be exclusive, and in place, of all other liability of the United States to the extent that the injury is

compensable under the Federal Employees' Compensation Act." If Congress had intended that meaning it would have said so. That it did not so intend is evidenced by the Congressional reports which explained Section 7(b) when it was added to the Compensation Act in 1949. Act of October 14, 1949, c. 691, Title II, Section 201, 63 Stat. 861.

The Senate Committee on Labor and Public Welfare observed (S. Rept. No. 836, 81st Cong., 1st Sess., pp. 23, 30):

> * * * The purpose of [Section 7(b)] is to make it clear that the right to compensation benefits under the act is exclusive and in place of *any and all other legal liability* of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time *needless and expensive litigation will be replaced with measured justice*. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.
>
> Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer * * *. * * * Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil ac-

> tion or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the Government.
>
> * * * * * * * * *
>
> The saving to the Government by the elimination of costly and needless claims and litigation under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, and the like, which presently weigh heavily upon the Government and involve considerable expense to defend will be eliminated, offsetting in substantial part the increased cost in compensation benefits. [Emphasis added.]

The House Committee on Education and Labor was even more explicit that the liability of the government for injuries sustained by a federal employee in the course of his employment is restricted to that provided by the Compensation Act and that a tort action against the government is barred. At one point it was proposed to add the language "unless otherwise specifically provided by law" to the exclusivity provisions of Section 7(b). It was thought that this language would make certain that no other Act of Congress would be construed to confer a supplemental remedy on employees of the United States unless such other statute declared specifically that the remedy afforded by it was given in addition to the remedy under the Compensation Act. The phrase was criticized by the Federal Security Agency, which felt that it was superfluous and, additionally, that it might be construed as continuing the effectiveness of federal tort statutes with respect to government employees and thereby impair the exclusiveness of the remedy under the Compensation Act. After pointing out this objection,

the House Committee stated (H. Rept. No. 729, 81st Cong., 1st Sess., pp. 14-15):

> * * * The committee shares this view. It is the committee's purpose to have the language of such section 7 entirely clear in this respect so as to express the *committee's intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer.* * * * [Emphasis added.]

It is, accordingly, apparent that Congress intended to provide compensation independent of fault for certain specified elements of damages, and that this compensation was to be exclusive and in lieu of all other governmental liability for damages—expressly including tort liability.

3. The only other court of appeals which has considered this precise problem agrees with the court below. In *Underwood* v. *United States*, 207 F. 2d 862 (C.A. 10), the husband of a federal employee who was killed in an airplane accident brought an action against the government under the Federal Tort Claims Act for loss of consortium. Since he was not a dependent widower, he had no remedy under the Compensation Act. Notwithstanding this fact, the Tenth Circuit held that his suit under the Tort Claims Act was barred because liability of the United States for the death of a federal employee in the course of his employment was exclusively defined by the Federal Employees' Compensation Act. Petitioner here was not totally deprived of a remedy as was the plaintiff in the *Underwood* case. Petitioner has admittedly collected payments under the Compensation Act for his dis-

ability, and there is even less reason in this case than in *Underwood* to depart from the explicit Congressional mandate.

As pointed out by the court below (Pet. App. B, pp. vii-viii), the Court of Appeals for the District of Columbia Circuit was confronted with the same problem in the context of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, which is analogous to Section 7(b) of the Federal Employees' Compensation Act. In resolving the question in the same way as the Ninth and Tenth Circuits, the District of Columbia Circuit observed (*Smither and Co.* v. *Coles*, 242 F. 2d 220, 222-223 (C.A.D.C.), certiorari denied, 354 U.S. 914):

> The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation. As stated by Mr. Justice Brandeis in *Bradford Electric Co.* v. *Clapper*, 1932, 286 U.S. 145, 159, 52 S. Ct. 571, 576, 76 L. Ed. 1026, the purpose of these laws was to provide "not only for the employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and de-

terminative." Thus, anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged.

* * * * * * * * *

In 1949 Congress amended the Federal Employees Compensation Act by inserting an exclusive liability clause the same, in all material aspects, as Section 5 of the Longshoremen's and Harbor Workers' Act. The purpose of this amendement was "to make it clear that the right to compensation benefits under the act *is exclusive and in place of any and all* other legal liability of the United States or its instrumentalities * * *." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). U.S. Code Cong. Service 1949, p. 2135. (Emphasis added.) From this background it can be seen Congress was necessarily interested in the employers' immunity to suits as well as in the employees' right to recovery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
JEROME I. LEVINSON,
Attorneys.

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